

U.S. FISH AND WILDLIFE SERVICE, SACRAMENTO, CALIFORNIA  
SPECIAL TERMS AND CONDITIONS FOR TE-022606-0

1. All sections of Title 50 CFR " 13, 17.22, and 17.32 are conditions of this Permit. The current version of these regulations is provided as Attachment 1.
2. The authorization granted by this permit is subject to compliance with, and implementation of: the Multiple Habitat Conservation Program Plan, Volumes 1, 2, and 3 (MHCP) (dated March 2003); Habitat Management Plan for Natural Communities in the City of Carlsbad (HMP) (dated December 1999); the HMP Addendum 1 (dated December 1999) and Addendum 2 (dated June 2003); and the executed Implementing Agreement (IA), all of which are hereby incorporated into the permit.
3. The Permittee (City of Carlsbad), its authorized agents, and third parties under the Permittee's jurisdiction and control, are authorized to take HMP Covered Species in Attachment 2, subject to the conditions in Tables 1, 2, and 3 of the attachment and as further conditioned herein, to the extent that take of these species would otherwise be prohibited under section 9 of the Endangered Species Act of 1973, as amended (FESA), and its implementing regulations, or pursuant to a rule promulgated under section 4(d) of FESA. Take of HMP Covered Species must be incidental to otherwise lawful Covered Activities on Covered Lands as defined in the IA and further described and depicted in the HMP. The amount of take and form of take authorized (e.g. harm, injury, or death) are described in these tables, and further clarified below.

Table 1:

No take is authorized for the 5 plant species in Table 1. Because take of plants is not prohibited under FESA, incidental take cannot be authorized under this Permit. Plant species included in the Permit in Special Terms and Conditions and in Table 1 are named in recognition of the conservation benefits provided for such plants in the MHCP, HMP, and IA, and receive those assurances identified in the MHCP, HMP, IA, and this Permit as provided in Special Term and Condition 14.

Fully Protected Species under California Fish and Game Code may not be taken or possessed at any time except under limited circumstances, as provided in the Fish and Game Code. No provision of any other law shall be construed to authorize the issuance of permits or licenses to take any Fully Protected Species. The following species in Table 1 are Fully Protected Species: California brown pelican (*Pelecanus occidentalis californicus*); American peregrine falcon (*Falco peregrinus anatum*); Light-footed clapper rail (*Rallus longirostris levipes*); and California least tern (*Sterna antillarum brownii*).

No take is authorized for the western snowy plover (*Charadrius alexandrinus nivosus*) and elegant tern (*Sterna elegans*).

Take authorization is effective upon Permit issuance for the southwestern willow flycatcher (*Empidonax traillii extimus*), least Bell=s vireo (*Vireo bellii pusillus*), and coastal California gnatcatcher (*Polioptila californica californica*).

For each of the remaining 10 animal species in Table 1 which are not listed as threatened or endangered under FESA, this Permit will become effective with respect to such species concurrent with their listing under FESA, should they be listed during the permit term, to the extent that their take is prohibited by FESA: 1) salt marsh skipper (*Panoquina errans*); 2) Harbison=s dun skipper (*Euphyes vestris harbisoni*); 3) white-faced ibis (*Plegadis chihi*); 4) Cooper=s hawk (*Accipiter cooperi*); 5) osprey (*Pandion haliaetus*); 6) yellow-breasted chat (*Icteria virens*); 7) California rufous-crowned sparrow (*Aimophila ruficeps canescens*); 8) Belding=s savannah sparrow (*Passerculus sandwichensis beldingi*); 9) large-billed savannah sparrow (*P. s. rostratus*), and 10) orange-throated whiptail (*Cnemidophorus hyperthrus beldingi*).

Table 2:

Table 2 contains only plant species. No take is authorized for the six plant species named in Table 2. Recognition of the conservation benefits provided for these species, and receipt of assurances for them as identified in the MHCP, HMP, IA, and this Permit as provided in Special Term and Condition 14, is contingent upon: (1) other MHCP Participating Jurisdictions obtaining coverage for these six species through an existing, legally operative incidental take permit; and (2) the Permittee demonstrating to the Service adequate funding for management of conserved areas for San Diego thornmint (*Acanthomintha ilicifolia*) and wart-stemmed ceanothus (*Ceanothus verrucosus*).

Table 3:

Take authorization for the 2 animal species in Table 3 is contingent upon the Permittee demonstrating to the Service adequate funding and legal access to manage and monitor these species consistent with the requirements of the MHCP (see Volume 3).

No take of plants in Table 3 is authorized. Recognition of the conservation benefits for these 11 plant species, and receipt of assurances for them, as identified in the MHCP, HMP, IA, and this Permit as provided in Special Term and Condition 14, is contingent upon: (1) the Permittee demonstrating to the Service adequate funding and legal access to manage and monitor these 11 plant species consistent with the requirements of the MHCP (see Volume 3); (2) the Permittee receiving legal control over the protection, management, and monitoring of the vernal pools adjacent to the Poinsettia Train Station that provide habitat for the San Diego button- celery (*Eryngium aristulatum* var. *parishii*), little mouselail (*Myosurus minimus* ssp. *apus*), spreading navaretia (*Navaretia fossalis*), and California Orcutt grass (*Orcuttia californica*); and (3) other MHCP Participating Jurisdictions obtaining coverage for the San Diego marsh elder (*Iva hayesiana*) through an existing, legally operative incidental take permit.

Take authorization for the Riverside fairy shrimp (*Streptocephalus woottoni*), and San Diego fairy shrimp (*B. sandiegoensis*) is contingent upon: (1) the Permittee demonstrating to the Service adequate funding and legal access to manage and monitor these 2 animal species consistent with the requirements of the MHCP (see Volume 3); and (2) the Permittee receiving legal control over the protection, management, and monitoring of the vernal pools adjacent to the Poinsettia Train Station that provide habitat for these species.

To initiate coverage for species in Tables 2 and Table 3, the Permittee shall submit in writing a request for coverage, including documentation of compliance with the necessary conditions of legally operative permits by other Participating Jurisdictions, funding assurances, and/or legal access and control. Coverage for these species shall not become effective until such time as both the Service and California Department of Fish and Game concur in writing that these conditions have been satisfied.

4. This FESA Section 10(a) Permit also constitutes a Special Purpose Permit under 50 C.F.R. ' 21.27 for the take of those HMP Covered Species which are listed as threatened or endangered under the FESA and which are also protected by the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. ' 703-712), in the amount and/or number specified in the MHCP and HMP, subject to the following terms and conditions. Such Special Purpose Permit shall be valid for a period of 3 years from the effective date, provided the Section 10(a) Permit remains in effect for such period. Such Special Purpose Permit shall be renewed upon written request to the Service, provided that the Permittee continues to fulfill its obligations under the MHCP, HMP, IA, and this Permit. Each such renewal shall be valid for the maximum period of time allowed by 50 C.F.R. ' 21.27 or its successor at the time of renewal.

5. In order to reduce the potential take of eggs or chicks of the coastal California gnatcatcher, the Permittee shall not allow any clearing and grubbing activities in known and potentially occupied coastal California gnatcatcher habitat during the breeding season which extends inclusively from February 15 through August 31.

6. In order to minimize impacts to coastal California gnatcatcher, California rufous-crowned sparrow, and orange-throated whiptail (*Cnemidophorus hyperythrus beldingi*) to the maximum extent practicable, the Permittee shall ensure that if the City of Carlsbad proceeds with plans to construct Cannon Road Reach 4, the extension of Melrose Drive through the Shelley Property, or Marron Road through the Sherman Property, the Permittee shall consult with the Service and California Department of Fish and Game on the preparation of a draft Environmental Impact Report to ensure that all potential alternatives to construction of these roads are fully considered. Any alternatives that include the construction of these roads shall meet the following standards unless otherwise agreed to by the Service and California Department of Fish and Game due to new information from scientific studies:

- a. A wildlife movement study that gathers wildlife movement data for at least one full year shall be conducted preceding the design of any road undercrossings.
- b. Noise within the underpasses shall be less than 60 dBA during the time of day that animals use it. Sound walls shall be considered along portions of the road

- that pass over underpasses in order to reduce noise levels, as increased traffic volume may decrease the frequency at which a species uses the underpasses.
- c. Shield corridors from artificial lighting. Use skylight openings within the underpass to allow for vegetative cover within the underpass.
  - d. Design underpasses or culverts to be at least 30 feet wide by 15 feet high with a maximum 2:1 length to width ratio. A more important variable is the openness of the underpass, which takes into consideration the height, width, and length of the underpass ( $H*W/L$ ). The openness value shall be greater than 0.6.
  - e. Avoid co-locating human trails with wildlife movement corridors/crossings. Underpasses shall be situated along primary travel routes away from areas containing noise and light pollution and serve only wildlife needs since human presence and/or recreational activities can deter wildlife activity. In order to prevent "at-grade" crossing attempts by the target species, fencing shall be installed to complement the underpasses. Fencing shall be used to funnel wildlife away from at-grade road crossings and toward undercrossings. Fencing shall be at least 8 feet high (measured from the ground up) and placed along portions of the road that bisect the natural open space to prevent end runs. Coyotes and deer are infamous for end runs, which means they will continue to shift their movements to go around the end of a fence instead of using an underpass. Furthermore, the fencing shall also have mesh that is less than 10 cm x 15 cm and be seated at least 15 cm into the ground to prevent the animals from exploiting any weaknesses, which would allow them access to the road. Finally, the fencing shall be installed to "funnel" the animals towards each underpass by using wing fencing on both sides of the culvert.
  - f. Screen undercrossing openings with natural vegetation. Native vegetation shall surround all underpass entrances and replace any proposed rock fill slope protection.
  - g. To maximize the width of the culvert available for wildlife movement, the water drainage area in the base of each culvert shall be as narrow as possible and placed to the side, rather than the center. Concrete V-ditches shall be eliminated to allow for natural stream flows, which provide the elements critical for the movement of sensitive reptile and amphibian species.

7. Before receiving coverage for thread-leaved brodiaea (*Brodiaea filifolia*), the Permittee must demonstrate to the satisfaction of the Service and California Department of Fish and Game, that the Fox-Miller project meets the narrow endemic standards for this critical location and major population of this species. The Permittee shall ensure that the proposed hardline provided in Addendum 2 to the HMP (June 2003) in Figure 21 for the Fox-Miller property is not permitted by the City of Carlsbad under the HMP, because it does not meet MHCP standards. The Service and California Department of Fish and Game will consider proposals for this project to that meet the conditions of coverage for *Brodiaea filifolia*. If these agencies concur with a project proposal, and the preserve area is managed and monitored to MHCP standards in perpetuity, the Permittee would receive coverage for *Brodiaea filifolia* and the Fox-Miller project could be permitted, under the HMP, through the amendment process described in section 20 of the IA.

8. In order to minimize impacts to coastal California gnatcatcher, California rufous-crowned sparrow, and orange-throated whiptail to the maximum extent practicable, the Permittee shall ensure that any opportunities to maintain and/or widen a corridor of habitat between Carlsbad and Oceanside are fully considered. This includes the Permittee upholding the City of Carlsbad's agreement that should the driving range adjacent to the Kelly/Bartman property be proposed for a different use, that the City will ensure an on-site corridor is established on the driving range property.
9. As part of the review process (e.g., California Environmental Quality Act) for individual projects within the City of Carlsbad, a qualified biologist shall survey for all species with immediate and conditional coverage (Attachment 2, Tables 1, 2, and 3) in all potential habitat areas.
10. The Permittee shall contact the Service's Carlsbad Fish and Wildlife Office immediately regarding any violations or potential violations of the FESA or Migratory Bird Treaty Act (phone 760-431-9440).
11. Within 1 working day of finding dead, injured, or sick endangered or threatened wildlife species, the Permittee or its designated agents shall orally notify the Service's Carlsbad Fish and Wildlife Office (phone 760-431-9440). Written notification to the Carlsbad Fish and Wildlife Office (6010 Hidden Valley Road, Carlsbad, California 92008) and the Division of Law Enforcement (185 W. AF@ Street, Suite 440, San Diego, California 92101) shall be made within 5 calendar days and shall include the date, time, and location of the specimen and any other pertinent information.
12. All monitoring and reporting for this permit shall be in compliance with the MHCP (Vol. I and III) and IA (section 12). Annual reports are due no later than December 1 of each year, beginning in 2005 and ending in 2054. Copies of all reports shall be submitted to the Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California 92008, and to the Assistant Regional Director, Ecological Services, U.S. Fish and Wildlife Service, 911 Northeast 11<sup>th</sup> Avenue, Portland, Oregon 97232.
13. A copy of this permit must be on file with the Permittee, its authorized agents, and third parties under the jurisdiction and direct control of the Permittee. Please refer to the permit number in all correspondence and reports concerning permit activities. Any questions you may have about this permit should be directed to the Field Supervisor, Carlsbad Fish and Wildlife Office, at 760-431-9440.

14. On June 10, 2004, the court in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D. D.C.) ordered that, until the Service completes a rulemaking on revocation standards for incidental take permits, the Service may not approve new incidental take permits or related documents containing No Surprises assurances. The order specifically allows for the Service to issue incidental take permits that do not contain No Surprises assurances. Therefore, the ANo Surprises assurances contained in sections 1.10, 2.3, 3.26, 10.3.A.(1), 10.3.A.(4), 10.3.C, 10.4.2.a, and 18.2.2 of the IA, sections 5.1.1 and 5.2.4 of the MHCP, section G of the HMP (with Addendum 1), and other applicable sections of the IA, MHCP, HMP, and of this Permit, are currently unenforceable and ineffective with respect to this Permit. The remainder of the Permit, the IA, the MHCP, and the HMP shall remain in full force and effect to the maximum extent permitted by law. In addition, in the event that any future judicial decision or determination holds that the ANo Surprises@ assurances rule (or similar successive rule) is vacated, held unenforceable or enjoined for any reason or to any extent, sections 1.10, 2.3, 3.26, 10.3.A.(1), 10.3.A.(4), 10.3.C, 10.4.2.a, and 18.2.2 of the IA, sections 5.1.1 and 5.2.4 of the MHCP, section G of the HMP (with Addendum 1), and other applicable sections of the IA, MHCP, HMP, and of this Permit, shall be enforceable only to the degree allowed by any such decision or determination; provided that the remainder of the Permit, the IA, the MHCP, and the HMP shall remain in full force and effect to the maximum extent permitted by law. In the event that the No Surprises assurances rule is vacated, held unenforceable or enjoined by a judicial decision or determination, including the June 10, 2004, order described above, but is later reinstated or otherwise authorized, the assurances provided under the revised rule shall automatically apply to the MHCP, HMP, IA, and Permit in place of sections 1.10, 2.3, 3.26, 10.3.A.(1), 10.3.A.(4), 10.3.C, 10.4.2.a, and 18.2.2 of the IA, sections 5.1.1 and 5.2.4 of the MHCP, section G of the HMP (with Addendum 1), and other applicable sections of the IA, MHCP, HMP, and of this Permit. If, in response to any judicial decision or determination, the "No Surprises" assurances rule is revised, sections 1.10, 2.3, 3.26, 10.3.A.(1), 10.3.A.(4), 10.3.C, 10.4.2.a, and 18.2.2 of the IA, sections 5.1.1 and 5.2.4 of the MHCP, section G of the HMP (with Addendum 1), and other applicable sections of the IA, MHCP, HMP, and of this Permit, shall be automatically amended in a manner consistent with the revised rule so as to afford the maximum protection to the Permittee consistent with the revised rule. Pursuant to the June 10, 2004, order in *Spirit of the Sage Council v. Norton*, Civil Action No. 98-1873 (D. D.C.), until the Service adopts new revocation rules specifically applicable to incidental take permits, all incidental take permits issued by the Service shall be subject to the general revocation standard in 50 C.F.R. '13.28(a)(5). Additionally, notwithstanding anything to the contrary in the IA, MHCP, and the HMP, the Service retains statutory authority, under both sections 7 and 10 of the FESA, to revoke incidental take permits that are found likely to jeopardize the continued existence of a listed species.